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GILBART LECTURES ON BANKING

1952

being a series of four lectures
on

Documentary Credit Problems

by

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DOCUMENTARY CREDIT PROBLEMS

IN the Gilbart Lectures last year I tried to set out the contractual relationships to which documentary credits give rise and to deal, mainly from the legal point of view, with some of the chief problems of the time. This naturally led me to discuss practice and at once I found myself in conflict with the practitioners. This year I propose to deal with the same problems and others, for it can hardly be said that those to which I then referred have become easier ; still less have they been solved. I suspect that the things I said in the 1951 series have here and there been ascribed to a desire to indulge in legal exercise for the fun of it. It was an enthralling task that I set myself, but it was a serious one and, as I still think, a useful one. Let me say at once that the opinions I express are my own. I do not speak for any bank or for the Institute of Bankers, but for myself alone.

So long as nothing goes seriously wrong, so long as good relations exist, then legal rights and obligations tend to be pushed into the background and are not allowed to intrude ; in any dispute, however, they assert themselves. In the sphere of documentary credits, contractual relationships have often not been judicially defined and in this country they have otherwise received little attention save in broad outline. Hence my intrusion upon and continuing upon the uncharted path. These lectures are intended for the listener who is interested to know not simply where he is going, but why he is going there. It is probably a good thing to avoid litigation, but sometimes it is just not possible to do so and then we have to turn to the law and it is as well if we understand it a little, the basic principles at least ; it may help to avoid difficulties which would otherwise lead to litigation.

As usual my first duty is to read you a passage from one of Gilbart's works. Once again, I can find nothing appropriate to my subject and so I have chosen the following from his *Practical Treatise on Banking*, vol. 1, section IV, published in 1865.

> "To be a good banker requires some intellectual and some moral qualification. A banker need not be a man of talent, but he should be a man of wisdom. Talent, in the sense in which the word is ordinarily used, implies a strong development of some one faculty of the mind. Wisdom implies the due proportion of all the faculties. A banker need not be a poet or a philosopher—a man of science or of literature—an orator or a statesman. He need not possess any one remarkable

quality by which he is distinguished from the rest of mankind. He will possibly be a better banker without any of these distinctions. It is only necessary that he should possess a large portion of that practical quality which is called common sense. Banking talent (using the word *talent* here in the sense of adaptation of character to any particular pursuit) consists more in the union of a number of qualities, not in themselves individually of a striking character, but rare only in their combination in the same person. It is a mistake to suppose that banking is such a routine employment that it requires neither knowledge nor skill. The number of banks that have failed within the last fifty years are sufficient to show, that to be a good banker requires qualities as rare and as important as those which are necessary to attain eminence in any other pursuit. The dealer in money exercises intellectual faculties of a high order, and of great value to the community. His profession has a powerful bearing on the practical happiness of mankind."

To complete my preface I would only say that if last year my lectures could be criticised as partaking largely of guesswork, at least they were in part supported by case law. For what I have to say this year there is practically no such support at all. I must of necessity touch on a good deal of the ground I covered last year, but what I have to say will, I hope, either present a new aspect or carry the process of analysis further. I would mention again that, except where indicated, I speak from the standpoint of the law of England and in relation to the irrevocable credit.

Stale Bills of Lading

I begin with our controversial friend the 'stale' bill of lading. In spite of the powerful arguments advanced against bankers in this country making any change in their attitude, I do not feel that the last word has been said and it would be better that the last word should not take the form of an adverse decision in the courts, in times less palatable than they are today. I am aware of the reasons why banks prefer to retain full liberty of action in this matter and refuse to pay, if they wish, when they regard the bills of lading as stale. From enquiries made recently, I found that while there was certainly more than one definition of a stale bill, there was one main reason for refusing to pay against such a document and few banks which did not find present practice convenient and salutary. The chief reason, practically the only reason, put forward by those who favour existing practice is that the banks have a duty—in some cases, it is suggested, only a moral duty—to the buyer, or to the opening banker at least, to protect his interests ; that this entails doing nothing which can

be avoided to render him liable to loss or expense deriving from the goods reaching their destination before the documents of title. It is asserted that the consignee may be involved in trouble and expense ; that he may be unaware of the arrival of the goods, with the result that they may be left on the dock and suffer damage; that there may be warehouse and demurrage costs and uncleared cargo fines ; that delay may mean the loss of a market ; further, that a weak or unscrupulous buyer might decline to take up the goods (although on what ground, unless it is that the tender of bills which are not stale is an implied term of his contract and of his banker's contract with the paying banker, is not clear). It is particularly said in the case of Argentina that delivery of goods cannot be obtained under indemnity and, therefore, it is vital that the documents arrive first.

I am speaking from the standpoint of the paying banker, but the stale bill of lading has a greater significance for the opening banker, for it is conceivable that he may be looking to the goods as security and the fact of the goods arriving first may diminish the value of the goods as security.

Definitions

Before considering the argument let us look at the definitions of a stale bill of lading. The following is a selection (the italics are mine) :

(*a*) "One which has not been *presented* within a reasonable time of the date of shipment—i.e., there has been undue delay in presentation (We think this arises from common law re c.i.f. contracts)."

(*b*) "One which by reason of delay in presentation or taking up of documents, *cannot be placed in the hands of the principal or his agent at the port of destination in time to clear the goods without delay* (This is a matter of judgment and one has to err on the side of leniency)."

(*c*) "We regard a bill as stale if it cannot *be delivered to the buyer within a reasonable time of the arrival of the vessel* at the port of destination."

(*d*) "We define a stale bill as one which we *calculate* could not reach its destination until after the arrival of the carrying steamer."

(*e*) A bill of lading is stale when it cannot reach our principal although forwarded by the fastest available route *before the estimated date of arrival* of the carrying steamer at the port of discharge of the relative goods.

(*f*) A bill is stale if to our knowledge *the ship has arrived* while the documents are still on their way.

(*g*) "Documents must be in our hands in time for dispatch by airmail *to reach the consignee before the arrival of the carrying steamer.*"

In principle these are the same, but there are marked differences of detail. Yet the important point is the argument, not the practice which results from it. I have given these definitions to show that there is no uniform view, that the steps taken to decide whether or not a bill is stale vary in degree. The questions which thus arise are:

(*a*) whether there is a legal duty as is, presumably, assumed by the banks, to safeguard the interest of the buyer;
(*b*) if there is, do the banks need to protect themselves in respect of that duty and is there any way in which they can do so;
(*c*) if there is no such duty—is the practice justified on other grounds;
(*d*) and, if it is, is there anything the banks can do to remove or secure any risk there may be?

Course of Business, Practice, Custom?

I submit, first, that there is no legal duty. It is not yet an express term in documentary credit instructions that payment shall not be made against stale bills of lading; nor is it an implied term—though the implication could arise, as between individual banks, from a course of business. There is no custom, for it is not the custom of all banks in this country to refuse to pay against stale bills and, anyhow, those that maintain their right so to refuse are equally insistent that they may accept if they think fit—and in fact they do. The other questions can, I think, be answered together.

Assuming that there is such a duty to protect the buyer's interest, is it necessarily in his interest that the paying banker should decline, except under indemnity, to accept bills of lading alleged to be stale; what does the buyer stand to lose? He has entered into a contract; either (*a*) the goods are what he has contracted for or (*b*) they are not.

(*a*) If they are what were contracted for, the buyer has nothing to lose. If the documents are refused by the paying banker on account of the bills of lading being stale, he may still obtain the goods under indemnity and the matter will automatically settle itself, though, possibly, at some greater expense than need have been. The position is the same if the paying banker accepts and forwards the stale bills; the buyer has the goods he contracted for and he cannot decline the documents on the ground that the bills are stale (except where his (opening) banker has been in the habit of declining them and has established a course of business to that effect, in which case his action is against his own banker). The same reasoning applies as between the opening and the paying or negotiating bankers. The disadvantage to the buyer seems to be that he may lose the chance of avoiding his contract by reason of a technicality. The only case in which he would legitimately suffer (apart from the cost of obtaining any necessary indemnity)

is where he did not know that the goods had arrived and had ultimately to pay charges incurred since their arrival. To avoid this it need only be part of the contract between buyer and seller that the latter should arrange for the former to be advised by what ship the goods are being carried and when that ship is due to arrive ; also when in fact it has arrived.

(*b*) Assuming, on the other hand, that the goods are not what the sales contract calls for, if the bills of lading are stale and the banker refuses them, the parties revert to the *status quo ante* and the seller has no complaint against the buyer. But if the banker pays, the buyer is prejudiced, not because the bills are stale but because the goods are not what he contracted to buy. He still has his remedy against the seller. He is in no different position from that in which a banker properly pays against the documents called for but which, in fact, represent goods which are not. The buyer should not be allowed to use the credit to take advantage of a fall in price or of the failure of a market or of any factor which might cause him to wish he had not bought. To say that he is liable to have to meet additional charges is besides the point and confuses the issue.

Sales Contract

It is not part of the function of the paying banker to enquire whether the seller is complying with his sales contract undertaking (which is, in effect, what he is doing), even if he knows precisely what that contract is ; nor is it necessary that, in order to do so, he should try to interpret the law as to c.i.f. contracts, for the sales contract is not his concern. Those who argue that the paying banker should see that the seller delivers the documents of title without delay admit that it would be expecting too much to be called upon to define reasonable time for delivery. The effect of their answer is thus that, whether time is reasonable or not, if in their interpretation the bills of lading are stale the seller is at fault—scarcely the attitude to adopt toward a contracting party to whom an unqualified undertaking has been given.

Whatever the merits of the banks' point of view it should be recognised that it could place them in a difficult position. It is hardly arguable that there can be such a duty—to the bank's principals—as has the effect of qualifying the paying bank's contractual responsibility to the beneficiary to the extent of placing an additional and perhaps impossible burden on him. That undertaking is just what it says it is and if the paying banker, by reason of the belief that the buyer impliedly instructs him, wishes to impose a condition that bills of lading tendered shall not be stale, then he should do so expressly, so that the beneficiary will know where he is. The condition could, of course, become implicit if it were followed—at least between the particular bank

and the particular beneficiary—so resolutely that it must be regarded as basic to the contract. But this would be difficult to establish, for the reason that there is no general practice by which the imposition of the condition could be justified ; no course of business on which the buyer is entitled to rely. Any attempt to establish a custom, moreover, would fail, for the only factor common to the banks is their reservation of the right to decline stale bills of lading.

Obligation of Paying Banker

The paying banker does not get his instructions from the buyer and so he cannot be said to be the buyer's agent ; thus he is under no duty to him. But he is the agent, the mandatory, of the opening banker and he certainly owes him a duty (*a*) to do what he undertakes to do and (*b*) not to be negligent. Any other duty is, shall we say, a duty of expediency. If the banker complies rigidly and promptly with his instructions he cannot be negligent ; therefore he is not called upon, because of circumstances and probabilities which are just as apparent to the buyer (and his agent, the opening banker) as they are to the paying banker, to assume conditions which are not specifically imposed upon him. Where he assumes the implied obligation he may find himself faced with two conflicting responsibilities, unless—which almost certainly is not the case at present—beneficiaries are similarly bound by the condition.

Bankers rightly insist, in another context, that they are concerned with documents and not with goods, and yet they assume responsibility for something which is essentially a question of goods and not of documents, essentially a matter for the buyer and seller, both of whom must be aware of the consequences which may follow the fact that bills of lading arrive after the goods. The buyer must either accept the position and take the risk, depending on any right of action he may have against the seller ; or refuse to accept the risk and enforce his refusal by expressly imposing a condition on the paying banker, to be transmitted by him to the seller.

The argument is further advanced that under a c.i.f. contract it is the duty of the seller to tender documents as quickly as possible (see *Kennedy on C.I.F. Contracts*, 2nd (1928) edn., pp. 111 and 112). But this is no concern of the paying banker, who is not called upon to judge. As Brett, M. R. said in *Sanders* v. *Maclean* ((1883), 11 Q.B.D. 327, at p. 337) :

> "It is impossible, to my mind, to say that even a stipulation ought to be implied in the contract that the bill of lading should be delivered so that it may arrive before or at the time of the arrival of the ship or before charges are incurred."

The buyer could and should make it a condition, or should so adjust the period of validity of the credit that delay in tendering

documents, likely to lead to the goods arriving first, will place the seller out of time.

Most banks in this country distinguish short from long sea routes ; some say that they do not, but treat each case on its merits ; others again endeavour to obtain definite instructions from their clients abroad as to when a bill may be considered stale, e.g., fifteen days after the date it bears. One bank would be willing to pay against a bill of lading up to a week or so old, but would require an indemnity where it knew that some days had elapsed since the discharge of the goods. Why a week ; why not eight days ; why any special period in relation to particular circumstances ? If it ever becomes possible to distinguish positively between a short sea route and a long sea route, in the sense that in the one case but not in the other bills of lading cannot be expected to arrive before the goods, then the attitude of the paying banker may become so definite that he will have brought into his contracts with the opening banker a condition which is implicit and, therefore, enforceable against him. He could thus set up a custom ; he assumes the responsibility of deciding when a bill is stale—of which there is no single definition—and whether or not to pay if it is. He runs the risk of accepting an implied term to his written instructions and of being rightly accused of negligence if he fails to comply with it ; the risk that if he fails to judge accurately when a reasonable time for delivery has elapsed, he may be held liable accordingly ; the risk of being found liable in damages to the seller if the documents are in fact such as had been agreed upon between him and the buyer.

Present Practice

All this is not to say that the present practice is wrong. As has often been pointed out, little trouble has arisen from it. Certainly the banks ought, on purely practical grounds, to consider the interests of their principals, but they should not blind themselves to their obligation to the seller. It is not always the case that staleness means breach of contract by the seller and that such breach can be avoided. For example, in regard to the South American or South African trade, a fast boat can complete the journey in thirteen to fourteen days, so that if the documents are presented seven or eight days after sailing (a reasonable period for the shippers to comply with the consular requirements and have the bills of lading legalised) there remain about six days for the documents to reach the port before the steamer. The air mail is scheduled to take four days and thus the bills of lading can hardly be considered stale by a paying bank in London. If, however, there is a delay of only two or three days in the air mail, then the goods may arrive first.

Some banks, when advising a credit, stipulate that bills of lading

shall be in respect of a current shipment ; but a shipment may be current in the sense that the goods are still on the seas, and yet it may be impossible to get the documents to their destination before the goods arrive. On the other hand, if the opening instructions do not contain such a requirement, then to call for it is to disobey the mandate. Agreed that it is not easy to see how this can operate to the detriment of the banker who insists on the requirement, but that may be because the circumstances cannot at present be visualised which would bring the seemingly unimportant breach of contract into serious reality.

Few banks, perhaps, would refuse to pay documents simply because, as far as can be seen, the bills of lading would arrive, say, one day after the goods. Yet the buyer may well be mulcted in charges, and the same result may follow if the documents are lost in the post. The only justification for the practice would be that there is a higher duty to the opening banker, or through him to the buyer, than to the beneficiary. If this is so, the beneficiary should be made aware of the fact when he is advised of the credit. Where the delay is something for which the beneficiary is in no way responsible and which may have been unavoidable, it is unreasonable that he should be penalised ; where he is responsible, his breach of contract, if such it is, is no concern of the paying banker unless, possibly, the latter happens to know of it and even then the responsibility is doubtful.

Breach of Contract—Remedies

To refuse to pay against documents including a stale bill of lading, except under indemnity, is a breach of the contract with the beneficiary. The effect is to turn the credit into a credit with recourse in circumstances in which recourse is not in the contemplation either of the buyer or the seller, and in which the bank would in all probability not have recourse. In such circumstances, if the seller chose to sue the paying banker for breach of contract, the latter would have no defence, while he might be unable to recover from his correspondents abroad. It would be no use arguing that by custom he was justified in refusing to pay, because there is clearly no custom—only a reservation of an alleged right—and no such right can be implied.

It is the buyer who knows the risks at his end, who is the more likely to be up-to-date in his information, who initiates the credit. It is, therefore, he who should insist that the paying banker does not pay against stale bills of lading and who should define what he means by stale, as by requiring bills of lading to be presented within a given time, dependent on the circumstances, of the date they bear. Or else the opening banker should place the responsibility on the shoulders of the beneficiary by authorising the paying banker in his advice to decline to pay against stale bills and confirming that his (the paying banker's) interpretation of

stale will be binding. It is the risk, run by the paying banker, of being bound impliedly to the opening banker on the one hand and finding himself thus in conflict with his express obligation to the seller on the other, that should and could be avoided. If, as in the case of exports to the Argentine, goods may not be lifted under indemnity, the importance of inserting a condition as to delivery in both the sales and the credit contracts is obviously imperative ; what reason can there be for not doing so and if the buyer fails to do so, why should the paying banker be at any risk ?

The British attitude is not, however, peculiar. Article 43 of the *Uniform Customs* provides that "Documents must be presented within a reasonable time after issuance"—and that "Paying, negotiating or accepting banks may refuse documents if in their judgment they are presented to them with undue delay." The leaving the decision to the judgment of the bank relieves it of any responsibility except, perhaps, where it is grossly negligent. Incidentally this is an improvement on the old wording, which ran: "Banks may refuse the documents if presented to them too late, in other words at a date not justified by the usual time taken to cover the distance between the place of dispatch and the place where payment is made." If the English banks subscribed to a common code, which was accepted by the commercial community, the problem we have been discussing would not exist.

It is not difficult to see how the coincidence of abnormal circumstances may lead to trouble. Delay may be the result of slackness on the part of the seller or of his inability to obtain the bills as soon as he should and may lead to goods arriving before the documents. It may happen that by reason of port congestion the goods cannot be warehoused, but have to be taken up by the buyer—under indemnity (though what the position of the ship would be in such circumstances if the buyers refused, is an interesting conjecture). The seller may still be in time according to the validity of the credit, but the opening banker refuses to pay on the ground that the bills are stale. The seller has lost control of the goods and has not received payment. Can he sue the ship for conversion by wrongful delivery and call on the buyer for the implementation of his indemnity ; and what is the position if by reason of the exchange control of the buyer's country the necessary exchange for reimbursement is not forthcoming ? I do not pretend to answer these questions, though the answer to the first is clearly in the affirmative—I only point to the importance of impressing upon sellers generally the necessity for acting with promptitude and of ensuring as far as possible that shipping companies and forwarding agents act with similar expedition.

INDEMNITIES

THE subject of stale bills of lading is inseparable from that of indemnities. In the last series of lectures I dealt with this matter in a general way ; in this I propose to proceed to the wider implications.

Indemnities nowadays are commonplace and tend to be regarded as a matter of form. This may not be unreasonable where the signatory is a reputable bank and the document is satisfactorily drawn ; but it ought to be borne in mind that an indemnity covers only the specific loss deriving from the cause of action in respect of which it is given. For instance, an indemnity in respect of payment against stale bills of lading may be no protection against loss resulting from some other cause, and perhaps not against loss emerging from some source which is a natural though incidental consequence of payment against stale bills. A bank which pays when it ought not may be left with documents in respect of depreciating goods and unless the indemnity is properly drawn, may have to look solely to the goods and, in addition, may find that the insurance does not extend to the particular risk. Suppose that a credit calls for full set on board bills of lading, that two only out of three are presented, with an indemnity to cover the absence of the third, and payment is made against them. The documents are declined by the buyer for the reason that the policy of assurance does not provide cover against a particular risk, for example, damage by sea water, which actually materialises. The indemnity gives the paying banker no recourse, because the reason for the refusal of the documents is not the absence of one bill of lading, which the indemnity was given to cover; and there is no cover either under the policy. It is easy to say that the banker was negligent in not noticing the defect in the insurance cover, but such an oversight can happen, especially in times of stress.

That the subject of indemnities should not be taken just as a matter of form is illustrated by an article which appeared in February, 1950, in the *Journal of the Institute of Bankers in South Africa.* A Canadian importer bought from a South African supplier on a contract to be financed by irrevocable credit calling for the goods to be shipped in one shipment from a specified South African port to a specified Canadian port. The sellers shipped part only of the goods on an American ship under a bill of lading expressing the port of discharge as 'Port of Discharge . . . [the specified Canadian port] via New York,' and stating that trans-shipment was at the ship's expense but at the shipper's risk. There were thus two breaches of the credit contract, part shipment and trans-shipment, which breaches were

covered by an indemnity to the South African negotiating bank in the following terms :

> "In consideration of your negotiating our draft under the above letter of credit, we hereby hold you harmless and indemnified against any consequences which may arise from or any loss sustained by the bank in the event of the draft being dishonoured by reason of irregularities of any nature whatsoever or any departure from the terms of the respective credit."

If the report is accurate, it cannot be said that this document was felicitously worded, but it served its purpose, for the South African bank accordingly negotiated the draft and forwarded it with the documents to its London office, with a note to the effect that the draft had been negotiated under indemnity. As might have been expected the Canadian bank opening the credit refused the documents, except against the indemnity of the London office of the paying bank, which was given. The terms of this indemnity are not stated.

Things then began to go wrong. When the ship arrived at New York the master decided that it was not worth his while calling at the Canadian port and instead he discharged the goods at New York and sent them by rail to their Canadian destination. Unfortunately, this meant that the goods attracted Customs duty at a higher rate than would have been applicable if they had not gone into Canada from the United States. The South African bank was called upon under its indemnity to meet the additional cost incurred by the Canadian importers, but found that on the wording of the indemnity received by it from the seller there was no claim against him, his liability having been limited to loss arising from any dishonour of the draft.

It is a moot point whether the bank could not have recovered as having been indemnified in respect of 'any loss sustained by the bank in the event of . . . any departure from the terms of the respective credit,' presumably by the seller. It might even be argued that there was an implied indemnity in respect of the loss which the bank actually sustained, for the seller was in effect indemnifying the paying banker in respect of the breach of his contract with the opening banker. Still, the document was unfortunately worded. The article finishes: "By giving the Canadian bank a counter-guarantee in order to obtain payment, the London office of the South African bank had performed an act which had not been authorised by the sellers . . . ," probably a much more important point, and, therefore, there was no recovery.

It is generally understood that where a bank takes up documents under indemnity, its principals should be advised. I think that there is no duty to advise, but it is usually done and sometimes

the buyer takes advantage of it. This raises the question whether the indemnity enures for the benefit of that bank only to which it is given and this depends upon the intention of the parties, as expressed in the document. The paying banker has done something for which he has no authority and, unless his action is ratified by the opening banker, has to rely on the goods and the indemnity.

Obligation to Accept Indemnity

Whether he need accept an indemnity was a question which came a few years ago before an American court in *Dixon, Irmaos & Cia. Ltda.* v. *Chase National Bank of the City of New York* (144f (2) 759 (September, 1944), cert. den. 324 U.S. 850), in which it was decided that a bank may not refuse an indemnity, if offered by a reputable bank, in respect of missing bills of lading. The ground for the decision was that there was a general and uniform custom among New York banks, exporters and importers to the effect that, in lieu of a missing bill of lading presented under credits calling for a full set, the banks issuing credits would accept a 'guarantee' satisfactory in form, if satisfied as to the responsibility of the bank giving it. In the opinion of the court the custom was incorporated by implication into the credits. This decision must not, however, be stretched further than it goes and I repeat that it refers only to missing bills of lading ; but it looks like the thin end of the wedge. Incidentally, banks in this country will generally accept an indemnity in respect of a missing bill of lading, but they reserve their right to refuse and it is not difficult to imagine circumstances in which they would. Where, however, they have exchanged open undertakings to accept documents from which one copy of the bill of lading is missing, they could only decline after giving reasonable notice to determine the arrangement.

Advice of the indemnity to the buyer and the buyer's banker puts him in a position at once to refuse the goods (assuming that the documents are, in fact, not in order). But he must ordinarily refuse or accept at once. Even if the irregularity is such as to raise the doubt whether the goods are what were contracted for, the buyer has no right to inspect before deciding whether to reject the documents. He cannot take advantage of a technical irregularity—whether it has any connection with the goods or not—to delay dealing with the documents until by reference to the goods, he can see whether he will accept them, unless (which is, perhaps, unlikely) he has the seller's consent to wait until they arrive. The opening banker must not do anything to prejudice the position of the seller, as by releasing documents to the buyer without payment, so that the latter can collect and inspect the goods.

Availability of Indemnity

It is in this connection that the availability of an indemnity becomes significant, and this is dependent upon the wording of the document and the intention of the parties. The questions which thus arise are

(*a*) whether the benefit of the indemnity is available to the opening banker and the buyer ;

(*b*) whether the indemnity carries the implication that the paying banker may indemnify the opening banker in order to obtain payment.

(*a*) The proposition that an indemnity enures only for the benefit of the banker to whom it is given is not generally accepted. I believe that in the United States of America it is commonly thought, by bankers and traders alike, that the indemnity given to the paying banker is available to the opening banker and the buyer as well. I am not acquainted with the argument in favour of this view, but I hardly think that it applies to this country, for the reason that no such proposition is normally intended. An indemnity is a contract and like any other contract is valid only as between the parties to it. Unless there can be read into it the implication that the benefit of the contract shall be available to anyone else, then the banker to whom it is given is alone able to rely on it and to enforce it ; and he cannot be made to enforce it for the benefit of anyone else. Even if there were the implication, it would not be actionable in the absence of consideration. While the American interpretation would not render it binding on foreign sellers whose impression is different, it might nevertheless result in the paying banker's finding himself morally responsible to his American correspondent and yet unable to recover from the beneficiary, the seller. But I would not wish to give the impression that the broader availability interpretation is unknown in this country.

When he asks his banker to indemnify a paying banker, a beneficiary has solely in mind the necessity for holding the banker covered in respect of payment in spite of some irregularity. He has no right to believe that it will rectify his breach of contract with the buyer ; he merely hopes that it will, knowing that he will be no worse off, and his hope is usually justified if the irregularity is a nominal and purely technical one. It is simply a ready means of saving time and of achieving the result which will in all probability follow in any event, though with some loss of time and possibly some expense. If he wished to include the buyer, the seller could easily do so.

Right of Buyer

But there is the further question ; on what ground may the buyer or his agent, the opening banker, assert a right to the benefit of a contract to which he is not a party and of the existence

of which he has no certain right to know ? He has not given consideration for the contract, unless it lies in the establishment of the credit or in the payment by the paying banker (where a paying banker is interposed). Such consideration would be past and, therefore, unavailing, but it could be read into the sales contract that the seller would, if necessary, give his indemnity, to enure for the benefit of the buyer. This I think most unlikely and too remote. The paying banker is not the buyer's agent. The buyer has, moreover, no need of the indemnity, for he may either accept or decline the documents. The only circumstances, therefore, in which he may wish to avail himself of the indemnity are those in which he tries to back the horse both ways—by hanging on to the documents until he has satisfied himself that he will accept the goods. But this he may not do. While it may not be unreasonable for him to see the goods first (which probably depends on the nature of the irregularity), and while also it may even be to the seller's advantage that this should be so, nevertheless the buyer's duty is to accept or refuse documents within a reasonable time (Article 10 of the Uniform Customs asserts to the same effect in respect of the issuing bank) and it is doubtful whether a seller would normally be willing to accord this licence. His attitude will, of course, depend upon the nature of the irregularity; if it is such that the seller would be doubtful whether the buyer would accept the goods without seeing them, it might be argued that he impliedly authorises the buyer to inspect the goods and to delay dealing with the documents until he has done so. But however this may be, the fact remains that the seller should make the position clear.

A recent case shows that the question is not an academic one. A shipment from, say, Australia to London, is covered by an irrevocable credit opened by a London bank, a term of which is that documents are to be presented to the Australian advising bank within ten days of the date of the bill of lading, but, of course, within the validity of the credit also. The documents are in due course presented to the opening banker in London with an indemnity in respect of the fact that they had not been tendered in Australia within the limit of ten days from the date of the bill of lading. The buyer refused to accept the documents except on the assumption that the indemnity of the Australian bank was intended for his benefit and covered the loss which he was bound to suffer, in respect of charges—storage in bonded warehouse, insurance, porterage and cables—which were the consequence of the fact that the documents were stale.

I do not know the terms of the indemnity which was given, but it can only have been offered with the intention that it should benefit the buyer, to the extent of covering him against any extraneous expenditure to which he might be put. Nor do I know whether the Australian bank were authorised to give the

indemnity or, if they were, the terms in which they were authorised. But this again emphasises the importance of visualising what may be required and of drawing indemnities accordingly.

Nevertheless, I would think that in the absence of an express authority and of any implication from the particular circumstances so strong that it cannot be denied, the indemnity enures only for the benefit of the banker to whom it is given.

There is the argument, a strong one, that the buyer should not use the indemnity to straighten out any breach of his sales contract, that he should either take up or refuse the documents—as he is required to do unless he gets authority to do otherwise—and if he decides to accept them, resolve direct with the seller any difficulty which may arise as the result of his inspection of the goods. This would be in line with the view that bankers are concerned with documents and not with goods ; yet if the seller has no objection—in fact, if he positively prefers it—there seems no reason why the difficulties should not be resolved in this way, except, possibly, that branches and correspondents may, for a time at any rate, find difficulty in getting their indemnities properly worded. But with stereotyped forms in use, no serious trouble should arise unless attempts are made, without advice, to adapt the wording of stock forms of indemnity to meet special circumstances. The recourse of the buyer is to his opening banker, for there is no privity between either and the paying banker under the indemnity, and the opening banker does not pretend to put the paying banker in privity with the buyer. Similarly there is no privity between the seller beneficiary and the opening banker or the buyer. The practical recourse of the buyer to the seller on the credit contract must be through the opening and paying bankers and the chain of recourse could be broken if the latter went further in indemnifying the opening banker than the seller's indemnity warrants.

Indemnification of Opening Banker

(*b*) The question whether the banker to whom the seller (through his banker) gives the indemnity is impliedly authorised to indemnify the opening banker depends, I think, in some measure on the question we have just discussed. Where, for instance, the seller intends his indemnity to cover the buyer as well as the paying banker, it follows that he impliedly authorises the latter to indemnify the former, or the former's banker—but only in similar terms. Yet if this is the seller's intention it could be argued that no further undertaking (by the paying to the opening banker) is necessary.

The moral of all this seems to be that all the parties interested should visualise the possibilities arising from documents not

being in compliance with credits and should draw indemnities in such terms as will give effect to their intentions.

Whether it is advisable to permit the benefit of indemnities to carry through is a matter of policy, but if the beneficiary wishes everything done that may be necessary to ensure payment of his draft, this may mean the indemnification of the opening banker by the paying banker, and the beneficiary's indemnity should provide accordingly. The authority may be there by implication, but it would be better to make sure. Further, the indemnity to the opening banker should be in similar terms to the one given to the paying banker. Certain it is that if irregular documents were always turned down there would be much delay and expense and possibly some set-back to foreign trade. It would be much better if sellers could be persuaded to see that their documents were in order before presenting them, the way to achieve this probably being for the banks to devise.

Limitation as to Time

The next question is for how long an indemnity remains in force, if it specifies no period of limitation ? I believe that New York banks refuse to accept any such limitation. The answer must depend, in the absence of any express stipulation, on the purpose underlying the indemnity, as evidenced by its scope. In legal terms, its validity lasts for a period of six years from the time a cause of action arises ; in practice, until no right of action under it can arise. In general, then, it can be regarded as effective up to a short time after the arrival of the documents, the buyer having a reasonable time in which to inspect them. If the indemnity imported the implication that the buyer could inspect the goods, then the indemnity would be effective up to such time after their arrival as permitted reasonable inspection. Anyhow, after that reasonable time has elapsed, whenever that may be, the indemnity is no longer available and even if it is not cancelled or returned, the banker giving it can regard his responsibility as at an end, for the buyer would not be able to act on the strength of it. The difficulty, as I see it, would be the paying banker's difficulty in knowing when the buyer had had a reasonable time to inspect. If, therefore, the indemnity goes no further than the addressee, as it must in the majority of cases, it becomes ineffective for the purpose of recourse as soon as the buyer has had a reasonable time to inspect the documents.

But it seems to me that the indemnity given by the paying or negotiating banker to the opening banker is more important, or more likely to lead to trouble. It would be more reasonable for such indemnity to be regarded as available to the buyer, at any rate in such countries which regard them in this light. I believe, however, that it is the salutary practice not to give these indemnities without the consent of the seller, which consent ought not

to be accepted unless the seller has a clear idea of what he is doing and the indemnity gives exact effect to his intention.

It is, however, customary for banks in this country to put a limit, generally six months, to a period of validity of an indemnity. While this may seem to be effective in practice, in the sense that the irregularities for which it is given may be disposed of within that period, it is not certain that it would be legally effective in circumstances in which it was not physically possible to resolve the question in that time. The indemnity is given for valuable consideration and it would be strange if a condition were permitted to be attached which violated the function of the undertaking. Whether or not the addressee would be held to have accepted the limitation as to time may be a question of fact, but this is the only ground on which the limitation could be effective in law.

It is likely that the inclusion of such a limitation can be justified only on practical grounds—the desire of the signatory banker to clear the entry from his books and its insertion would probably prompt or encourage the parties to this end. Either a claim under the indemnity can arise or it cannot ; if it can, then it must arise within a short time of the arrival of the documents at their destination and there is no reason in law why an arbitrary limit should be set—as if to say that if it does not arise within six months, then it shall be treated as not arising at all. To see the unreason of this attitude, one has only to consider reducing the period until it is unreasonably or impossibly short. Why should a day extra or less make any difference ? If at the end of six months there is a valid potential claim, it is certainly against the intentions of the receivers of the indemnity that the signatory's liability should suddenly cease.

However, if the limitation is effective, it relieves the seller also of any responsibility under the indemnity after the period of limitation has elapsed.

Limitation as to Amount

Some banks endeavour also to limit their responsibility as to amount. This may be no more reasonable, for it could largely nullify the value of the indemnity. I suppose a margin over and above the insured value of the shipment is taken as the measure, but this could be swollen with costs of all kinds. The addition of such a limitation deprives the signatory bank of the right to refuse a similar limitation when the boot is on the other foot.

I feel that if indemnities are to be given and accepted, no limitation is reasonable except that which defines the cause upon the happening of which the instrument becomes actionable.

Return of Documents

The position as to the return of documents on their refusal by the buyer gives rise to difficulty. For instance, a foreign bank

instructs its London correspondent to open its irrevocable credit in favour of a British exporter. The instructions ask that when the bills of lading are received, two of the three should be sent with the other documents to the opening banker and the third to a third party. The documents are irregular in some way, payment is made under indemnity and the opening banker refuses them. He will return to the paying banker those he received, including the two bills of lading ; but he is not necessarily in a position to see that the third is returned. The question is whether, as a condition of being reimbursed in respect of the payment he made, the paying banker is under a duty to return to the seller the full documents he received from him.

The indemnity is a new contract superimposed on the credit contract. Usually it covers the paying banker in respect of any loss he may suffer by reason of the breach of the instructions he has received from the opening banker. Is it a necessary consequence of the irregular payment that one of the set of bills of lading is out of the control of the opening banker and, therefore, of the paying banker ? The consequence may be too remote, though the position might be different if the instruction to send the bill to a third party were brought to the notice of the seller at the time of the delivery of the documents or earlier. Yet this might well be something that the opening banker would not wish to be divulged. It is impossible to generalise, but I incline to the view that the seller cannot intend to indemnify the banker against a loss which he (the seller) has not envisaged and which arises from the voluntary act (as regards the seller) of the paying banker. The loss does not flow naturally and immediately from the irregular payment. Therefore indemnities should be so drawn that the seller beneficiary (or, rather, his banker) indemnifies the paying banker in respect not only of payment against irregularities but of any loss which may result from compliance (except in this respect) with the opening banker's instructions ; but if those instructions are brought to the notice of the beneficiary, then his request for payment under indemnity probably precludes his claiming against the paying banker for failing to return the third bill of lading.

It may, however, be impossible to return any of the bills of lading. The cargo may be such that when it arrives the bank opening the credit (or the paying banker's correspondents) may have to deal at once with it, which necessarily means obtaining control against documents. It may be in the interest of the seller that this should be so and in such a case there can be no question of the return of the documents, the seller having to make the best of a bad situation. Where the fact that the documents cannot be returned emerges from some action properly taken in the interest of the goods, the seller would probably be bound by it, as having impliedly authorised the action when giving the indemnity.

A similar position does not arise between the paying and the opening bankers, so that the former's duty to the seller in respect of lost documents is not covered by the opening banker's obligation to him. The paying banker has no authority to accept an indemnity and the opening banker owes no duty to the seller. Where the opening banker returns documents to the paying banker, he naturally does not pay him and if he has been debited in account, he can insist on being recredited ; and this, I think, even where it is not possible for the opening banker to return all the documents. He would probably do his best to obtain the return of the third bill of lading in the example I have chosen, but if he does not succeed the fault does not lie with him and the risk is the paying banker's for having paid against irregular documents.

Where documents are negotiated to successive buyers, those who take goods under documents which are defective according to the original sales or credit contract, must take them as they find them ; they cannot look to the indemnity to rectify any omission or weakness in their purchase. Their claim, if any, is against the persons who sold to them.

Ratification

With this subject, of irregularities and indemnification in respect of payment in spite of them, is associated that of ratification. There is, of course, nothing to prevent a buyer or his (the opening) banker from ratifying the action of the correspondent banker in paying in spite of irregularities in the documents ; in fact this happens more often than not, by the simple fact of acceptance of the documents. But it can also happen without intention—the intention which is necessary to the concept of ratification being implied from the action of the buyer or his banker. I would remind you again of the *dictum* of Roche, J. in *Westminster Bank Ltd.* v. *Banca Nazionale di Credito* ((1928), 31 Ll.L. Rep. 306), to the effect that "if parties keep documents which are sent them . . . in consequence of some mandate which they themselves have issued, and keep them for an unreasonable time, that may amount to a ratification of what has been done as being done within their mandate." A good example of this is to be found in the case of *Bank Melli Iran* v. *Barclays Bank* (*Dominion, Colonial and Overseas*) (*Journal of the Institute of Bankers*, vol. LXXIII (1952), p. 53), in which the defendant bank paid against documents which did not comply with the terms of the credit.

. Barclays relied mainly on the plea of ratification, to which Bank Melli's reply was that ratification did not apply as the relationship between the two banks was that of banker and customer and not that of principal and agent—a contention which was clearly untenable as regards the credit. The learned Judge's

argument on the ratification issue is so important that I give it as he stated it. He first dealt with ratification in general and said :

"It is, I think, clear on authority (1) that it is immaterial whether the act relied upon as ratification was done to the person seeking to avail himself of it or to another, (2) that ratification for a time operates as ratification altogether, see per Lord Blackburn in *M'Kenzie* v. *British Linen Bank* (L.R. 6 App. Cas., p. 82, at pp. 99 and 100), and (3) that a party cannot affirm in part and disaffirm in part (see per Lord Justice Chitty in *Republic of Peru* v. *Peruvian Guano Co.* (L.R. 36 Ch. D., p. 489, at p. 498).

"There was considerable debate before me as to whether or not mere inaction or silence can amount to ratification. In my judgment it is plain that mere inaction or silence may be evidence from which a jury might infer an intention to ratify. See the direction of Chief Justice Abbott in *Prince* v. *Clark* ((1823), 1 Barn. & Cres., p. 186). I am unable to accept the submission made on behalf of Bank Melli that this decision is in any way inconsistent with the speeches delivered in *M'Kenzie* v. *British Linen Bank.*"

Then he continued :

"I am now in a position to examine the circumstances which are relied upon by Barclays Bank as amounting to ratification.

"As stated above Barclays Bank paid the sum of £40,000 against the first set of documents on January 17. On January 24 Barclays Bank forwarded to Bank Melli photostat copies of the documents stating that they were holding the documents 'in safe custody for your account pending receipt of further instructions.' This letter with its enclosures was received by the Bazaar branch of Bank Melli on March 2, received by the Central branch on March 4, on which day the Central branch without comment forwarded a copy of the letter with enclosures to Kharrazi asking for their instructions."

It would seem that the plaintiff bank were here at fault, for they should have informed their customer that the documents were not in order and obtained his authority to accept or refuse at once.

"On March 10 Kharrazi replied raising certain enquiries as regards the phrases 'new comma good,' 'new hyphen good' and 'in new condition,' but not expressly or impliedly rejecting the documents. This letter was forwarded by Bank Melli to Barclays Bank on March 13 also without comment, the letter being received by the Bank on March 25, more than two months after they had paid against the documents. On receipt of this letter Barclays Bank on March 27 suggested to Eastern Developments 'that the best method to satisfy Messrs. Kharrazi would be for you to certify that the trucks are new.' "

I cannot myself see how this could be effective for the credit called for a U.S.A. Government certificate. However, "Eastern Developments acted on this suggestion and on April 5 Barclays Bank reply to Bank Melli enclosing an extract from Eastern Developments' letter as follows: 'In reply to your above-quoted letter, we hereby certify that the vehicles sold under the above-mentioned credit are new, and that the guarantee provided by the U.S.A. Office of Foreign Liquidation Commissioner is intended to certify to that effect.' This letter reached the documentary credit department of Bank Melli on April 15 and remained unanswered."

The seemingly casual behaviour of Bank Melli up to this time would, I should have thought, have deprived them of all right to complain of the payment against unsatisfactory documents. In fact they did not reject until two months later.

"Meanwhile preparations were being made for the shipment of the first 28 trucks and Kharrazi were so advised on March 25, but took no action to stop shipment. The 28 trucks were put on board at Antwerp about March 28. After some difficulty about the form of the bills of lading, which was cleared up in correspondence, Barclays Bank, about the middle of April, were faced with a demand for the payment of £3,684 for freight and charges on these 28 trucks. They took the view, probably rightly, that their authority to disburse the final £5,000 of the credit for freight and charges only extended to disbursing it *pro rata* over the 100 trucks and accordingly on April 25 they cabled to Bank Melli as follows: 'Your credit 15249 Eastern Developments require increase £2,284 8s. 9d. to cover charges £3,684 8s. 9d. on 28 trucks remaining £1,400 being drawn from existing balance on credit of £5,000 stop cable authority immediately.' (The figure of £2,284 8s. 9d., the amount of the increase for which authority was being asked, being arrived at by deducting from £3,684 8s. 9d. (the amount of the freight and insurance on 28 trucks) £1,400, being the proportionate part of £5,000 applicable to 100 trucks.) On May 14 Bank Melli by cable reply as follows: 'Yours 25th ultimo credit 15249 orderers agree increase Bankmelli.'

"In my judgment the action of Bank Melli in authorising Barclays Bank to make this increase is completely inconsistent with an intention to repudiate the first payment. It is in effect an authority to Barclays Bank to pay not only part of the original £45,000 but an extra sum of their own money against a bill of lading which could only be made available to them by the use of the documents, namely, the delivery order against which the first payment was made. In my judgment this act alone is sufficient to amount to ratification, but when it is coupled with Bank Melli's failure to repudiate or reject the original documents until

June 15, by which time the first 28 trucks had arrived at Khorramshahr and been surveyed there is, in my judgment, an overwhelming case of ratification. I express no view on the question whether the acts of Kharrazi themselves, in pressing Eastern Developments to hasten shipment and in surveying the trucks on arrival or the action of Bank Melli in formally calling upon Kharrazi to pay on advice that Barclays Bank had paid £40,000, would alone amount to acts from which ratification could be inferred, but it is right that I should say that, having heard the evidence of Mr. Samii as to the accounting methods adopted by Bank Melli, I attach little importance in this connection to the routine entries made in their books of account. It seems to me to be plain that once Bank Melli learned that Barclays Bank had paid out the £40,000 and would be raising a debit against them, it was essential that Bank Melli should raise a corresponding debit against Kharrazi.

"The position as regards ratification of the second payment is more difficult. As stated above Barclays Bank paid the final £3,684 against bill of lading, insurance policies and invoice on May 20 against a letter of indemnity from Eastern Developments for discrepancies in these documents.

"Advice of this payment, together with photostat copies of the documents and information as to the guarantee, was sent the same day by Barclays Bank to Bank Melli, who received them on June 15, the very day upon which they had written to Barclays Bank rejecting the first documents. Yet no action was taken by Bank Melli on receipt of the photostat copies covering the second payment until July 15, when they formally applied to Kharrazi for settlement of the £3,684 8s. 9d. notifying them that in default of payment 12 per cent. interest would be debited to them and asking for instructions as to the release of the letter of indemnity taken by Barclays Bank. Instructions to repudiate were given by Kharrazi on July 21, and on July 23 Bank Melli cable their repudiation in the following terms: 'Credit 15249 your schedule 20/5 and attached documents orderers claim refund paid as requested by our cable 19th Bankmelli.'

"There was thus an interval of nearly six weeks between the receipt on June 15 by Bank Melli from Barclays Bank of the documents against which the second payment was made, and the despatch on July 23 by Bank Melli of their cable of repudiation. Unexplained this delay and inaction might afford evidence from which an intention to ratify might be inferred.

"But evidence was given by Mr. Samii, which I accept, that owing to pressure of work in the documentary credit department there was great delay in dealing with current matters, and if matters had rested there I should have been inclined to hold that no ratification had taken place up to July 23, when the trans-

action was repudiated. But after receipt on June 15 of the documents for the second payment, Bank Melli in my judgment acted in a manner inconsistent with the maintenance of their repudiation, or inconsistent with an intention to repudiate. I have already referred to their application to Kharrazi on July 15 for payment, such application importing in my judgment an assertion by Bank Melli that they were willing to hand over the documents against payment. This application was repudiated again when all the facts were known when by a letter of September 15, 1947, Bank Melli called upon Kharrazi again to settle as soon as possible for the documents received.

"Furthermore they allowed and assisted Kharrazi in taking action which was also only consistent with the transaction so far as Barclays Bank was concerned being in order. Having in a cable dated June 10 introduced to Barclays Bank one Hoffazi as Kharrazi's representative 'authorised to make a survey of trucks' (that is the remaining 72 trucks) 'and take any action deemed necessary,' Bank Melli on July 12 acceded to Barclays Bank's request for authority to supply photostat copies of the documents to Hoffazi, and after their repudiation on July 23 failed to countermand, or insist upon Kharrazi countermanding, Hoffazi's authority. Thereafter, without any interference by Bank Melli, Hoffazi, when it appeared according to his examination that the trucks were not new, was permitted to instruct solicitors in London to put forward claims against London Suburban, and himself to attempt to negotiate a settlement with the American authorities, such action on Hoffazi's part being consistent only with acceptance of the bank's payments as being in order.

"Had Bank Melli desired to maintain their position as against Barclays Bank it was their bounden duty to take prompt steps to dissociate themselves from the action of Kharrazi and their representatives in Europe in a course of conduct consistent only with acceptance of the Bank's action in paying against the documents. See the judgment of Lord Justice Chitty in *Republic of Peru* v. *Peruvian Guano Company* ((1887), L.R. 36 Ch.D., p. 489, at p. 499)."

The interesting feature of this case is that it was dealt with on the basis of ratification. I have throughout these lectures asserted that the buyer must accept or refuse at once, that he is not allowed to delay except with the consent of the seller. It follows, if this assertion is right, that having failed to decline, the buyer adopts the irregular payment. The paying banker's position would depend on whether he had a right of recourse to the seller (in this case he had no indemnity, except for the second and smaller payment), and any delay would make his position more difficult, for his right of recourse to the seller might be lost if the latter had

changed his position following the payment. I have regarded the matter from the contractual point of view, which reaches the same conclusion as did the learned Judge in this case.

There are two points in the judgment that I wish to deal with especially. The first is the statement in regard to the delay of the Bank Melli in dealing with Barclays' letter of June 15, which suggests that he would not regard six weeks' delay such as to justify a plea of ratification in conditions of pressure similar to that from which Bank Melli's documentary credit department was said to be suffering. It may not be possible to lay down any rule in these matters, but there are many practical reasons for not permitting such a long period of licence in any conditions. As I have tried to show, it is of the essence of contracts between banks that matters in dispute shall be dealt with promptly, for too much depends upon this in the majority of cases. Banks, moreover, in this country are not as a rule permitted to plead the exigencies of business in mitigation of some failure to carry out instructions, and it is certain that no English bank would consider that it stood in a very strong position in similar circumstances if it allowed some six weeks to pass before notifying its correspondents that it could not accept the particular transaction. They would imagine, long before that period had elapsed, that they were estopped from setting up the failure of their correspondents, no matter what the circumstances, provided these did not preclude the physical possibility of communicating. What happens in practice is that normally these matters are not allowed to go by default. Delay is permitted only by agreement.

The second point concerned Barclays' contention that, having failed to comply with their instructions, they thus became possessed of an independent title to the goods, as purchasers of them. His Lordship did not care for this opinion, but he thought that the bank had a sufficient interest in the goods to support the argument that mere silence on the part of Bank Melli amounted to ratification of their action. It would seem certain that in keeping silent when they should have acted Bank Melli became estopped from asserting the failure of their correspondents to comply with their instructions. Without knowing the exact argument of Barclays in this respect, it is not easy to consider the contention that they were purchasers of the goods. Nevertheless, the goods would unquestionably have been theirs, but for the ratification ; if the documents had been returned by Bank Melli and had been unreturnable to the seller (as might have been), Barclays would have been left to make the most of the bad job.

CLAUSED BILLS OF LADING

THE problem of claused bills of lading is still exercising the minds of bankers and shipowners. It has received attention recently by the International Chamber of Commerce and Article 18 of the Uniform Customs is different today from what it was this time last year, but not materially so. It reads :

> "Shipping documents bearing reservations as to the apparent good order and condition of the goods and the packaging may be refused.
>
> "A clean shipping document is one which bears no superimposed clauses declaring a defective condition of the goods or packaging.
>
> "The following should not be considered such reservations : (*a*) clauses which do not expressly state that the goods or packaging are unsatisfactory, e.g., 'second-hand cases,' 'used drums,' etc. ; (*b*) clauses which emphasise carriers' non-liability for risks arising through the nature of the goods or the packaging ; (*c*) clauses which disclaim on the part of the carrier knowledge of contents, weight, measurement, quality, or technical specification of the goods.
>
> "Unless otherwise specified in the credit or inconsistent with any of the documents presented under the credit, banks may honour documents stating that freight or transportation charges are payable on delivery."

The criticisms which I made last year are generally pertinent today ; what is a clause which declares a defective condition of the goods or packaging ? A clause may not do this in so many words, but it may do so by implication and unless one can be sure against what 'risk,' if any, the shipping company is trying to shield itself, it is impossible to be happy about any clause and if there is a risk, no matter what it is, the document is 'dirty' from the point of view of a banker if it calls attention to the fact. Why should he be faced with such a gamble ? The claim of the Institute of London Underwriters (as given in the annual report of the Committee for 1951) to the effect that "one of the most satisfactory achievements [of the International Chamber Commerce at Lisbon last year] was the adoption of a clear definition of a Clean Bill of Lading..." is hard to understand.

Article 18 is in one respect somewhat contradictory. It begins by authorising the refusal of shipping documents bearing reservations ; it then proceeds to speak of superimposed clauses. Whether the first paragraph is governed and qualified by the second is not clear, but I see no reason for the distinction. The effect of the bill of lading would seem to be the same whether a reservation is contained in the body of it, as part of the printed matter, or in the description of the goods carried or, again, in a clause superimposed by means of a rubber stamp. For example,

I am not sure that a bill of lading in the body of which the goods are described as 'unprotected bundles of steel sheets' is less damaging than one on which a clause to similar effect is superimposed. There would be no point in including the word 'unprotected' unless it had some significance and, if it had, then the bill would be just as dirty as if the reservation was superimposed.

It has been recently suggested by shipping interests that banks should accept the principle that :

> Bills of lading which do not bear any superimposed clause expressly declaring a defective condition of the goods or packaging are acceptable.

This is merely a variation of the second paragraph of Article 18 and takes us no further.

The question is thus raised how far a banker must look into bills of lading to discover whether they contain reservations concerning the condition of the goods or packing. Unless a clause has a specific technical meaning which is recognised by all those who use it or have to accept it, it will be judged in law by what it means in ordinary language as governed by its context, and it is reasonable to interpret 'unprotected' as applying to something which needs protection. I would hesitate to suggest that bills of lading could be scrutinised so closely in practice as to put the matter beyond doubt. But this would, I feel, be no excuse in law for not doing so.

While the difficulty of the shipowner's position is recognised, and the necessity for him to protect himself, and while, too, there is no point in criticising him for wishing to do so, it should be equally recognised that there is no good reason why the banker should accept responsibility in the matter. If there is a need for the reservation of rights in regard to the condition of the goods or the packing, the banker is justified in refusing to pay against a document which includes such a reservation. To take an example, some shipping companies last year clausedthe ir bills of lading so as to relieve themselves of responsibility (in respect of shipments of iron and steel products) for correct delivery and for expenses incurred by reason of the fact that consignments were not clearly marked with the name of the consignee. This is a reasonable reservation ; but it is equally reasonable that a banker to whom is tendered a bill of lading to which is added a clause to the above effect, may rightly refuse to pay on the ground that the bill of lading is not clean ; and if the goods, by reason of their lacking identification marks, do not reach the consignee, the seller should be responsible, and a banker who paid in spite of this clause would find himself in a somewhat difficult position *vis-à-vis* his principals.

Another difficulty falling under this head came recently to my notice. Certain shipping companies trading from European and Eastern ports to ports in which it was impossible for ships to

discharge other than by lighter—the cost of which was high—had been in the habit of charging freight to include all costs up to delivery into warehouse. They decided that in future they would not be responsible for the lighterage and would charge freight up to discharge into lighters only. This meant that a seller who thought he was shipping c.i.f., as he was required by his sales contract to do, was, in fact, falling short ; and banks who had opened credits were rightly paying against bills of lading which were clean, and yet finding that the buyer rejected the documents on account of the fact that liability for lighterage had been left to him ; or would find, on the other hand, that their continental correspondents were paying against bills of lading marked F.F.A. (free from alongside), which the buyers were refusing to accept. The difficulty was enhanced by the fact that in countries subscribing to the Uniform Customs such bills were acceptable as clean.

An interesting American decision on 'clean' bills of lading is reported in *American Maritime Cases* ((1950), 1235). It is the case of *Givaudan Delawanna Inc.* v. *Nederlandsch-Amerikaansche Stoomvaart Maatschappij*, in which the plaintiffs were buyers of bills of lading covering citronella oil from Rotterdam to New York. The oil was in drums carried on deck and some of it was damaged as a result. In spite of the fact that the bill of lading provided that the vessel should have the right to carry goods on deck at shipper's risk, the plaintiffs argued that it should have been carried below deck ; that the bill of lading was clean and thus any clause permitting on-deck storage was invalid—a queer argument, to say the least. The judge said that a clean bill of lading could not import under-deck stowage except in the absence of a specific provision as to stowage. And he found for the defendants on the ground that the plaintiffs took the bills as they found them and could not complain of the shipping company's qualification. In a similar American case, *Re The Peter Helms* ((1938) A.M.C. 1220), it was held that when a bill in the body of it reserved to the shipping company the right to carry merchandise on-deck or under-deck at its option, the bill was not clean. Probably the same would hold in this country also.

As regards deck stowage, Article 21 of the Uniform Customs says : "Banks have the right to refuse bills of lading mentioning the storage of goods on deck, but may accept such bills of lading where the documents presented include an insurance policy or certificate mentioning that the goods are stored on deck." British practice is to refuse bills of lading showing deck shipment unless such shipment is authorised by the credit. This is the position, moreover, even if the bill in the body of it, and not by means of a superimposed clause, reserves the right to ship on deck. The point is that deck shipment is liable to lead to damage to goods, except where they are such that no damage can be sus-

tained ; and a banker cannot know for certain what the position is in this respect. So far British practice is in line with Article 21, but British banks would not necessarily assume that the defect in the bill of lading would be cured by a policy of assurance providing cover for goods expressly stated to be stowed on deck. In other words, it is regarded by British banks that it is an implied term in credits (in the absence of an express authority) that goods shall be shipped under-deck.

Bills of lading, though not claused in the sense we have been applying to the term, may yet not be acceptable. For instance, some bills contain at their foot a note 'subject to mate's receipt.' This, in my view, is a qualification which detracts from its clean condition. Some bills, moreover, admit shipment on board s.s. . . . '(or substituted ship).' This, too, is unsatisfactory, especially if the credit names a particular ship ; but even if it does not, there is no certificate that the goods are on board any ship at the time the bill is issued.

The only hope of a practical solution would seem to be that the bills of lading should be clearly labelled, according to type, for what they contained, so that they could be recognised at sight ; but this would entail constant liaison between banks and shipping companies to ensure that changes were not made by the latter without the cognisance of the former. In fact, nothing short of universal international agreement by all sections of all commercial communities would suffice completely to meet the difficulty for all time ; but efforts, such as those of the British Liner Committee, to discourage indiscriminate clausing of bills of lading are a welcome step in the right direction.

Transfer

The subject of the transfer of credits is still troublesome ; the exact rights and obligations set up by the issue and transfer of a transferable credit still await judicial definition. The responsibility of a paying banker under a transferable irrevocable credit is not precisely known, one of the questions unanswered being whether a banker who accepts transferable credit instructions may refuse to deal with a particular transferee nominated by the original beneficiary.

Most bankers would argue, perhaps, that, being authorised to permit transfer, the paying banker need not concern himself with the thought whether the instructions to transfer could be refused—a point of view which is reasonable enough. Nevertheless, although it is no part of the paying banker's legal duty to consider any other aspect of the matter than payment against the documents called for, the fact remains that his mandate is not altogether clear, for no one knows precisely what is in the seller's mind—so that the question cannot be summarily dismissed. The mandate is peremptory only, so far as payment to the beneficiary is con-

cerned (once it has been confirmed to him) ; is it permissive as regards a transferee ?

The buyer, when authorising transfer may have had the idea of transfer suggested to him by the opening banker, or he may have used the expression without knowing, except vaguely, what it means ; or he may have had in mind that the seller, being an agent, might accordingly wish the credit to be made available to the actual supplier. If he has transfer in mind (and perhaps a particular transferee), when he instructs his banker it is conceivable that he knows that his contract cannot be completed without it—in which case he might suffer loss if transfer were refused ; and so there may be circumstances in which the buyer intends that the credit shall impose on the paying banker the obligation of transferring to any transferee suggested by the beneficiary. However that may be, whatever the extent of the buyer's understanding and intention, by giving instructions for the opening of a transferable credit, the buyer may set in motion an activity by which he will be bound, because he must accept responsibility for anything which naturally and directly flows from his authorisation, express or implied.

The better point of view is that unless the mandate expressly instructs the banker to permit transfer at the instigation of the beneficiary and to whomever the beneficiary nominates, the banker cannot be assailed if he refuses, providing always that he remains willing to pay the prime beneficiary. One of the reasons for the somewhat reluctant attitude of British banks toward transfer is the risk that they may find themselves dealing with someone—a transferee—with whom they would prefer not to contract. I am not sure what the risk is, though it could have special significance if the banker were relying on the documents as security for the finance he provides ; if he is doing more than acting purely as an agent for an undoubted principal he might be forced into the position in which he could incur a loss. This can hardly be within the contemplation of either buyer or opening banker. If it is important to the buyer that transfer should be permitted to any nominee of the prime beneficiary, he should insist in his instructions, giving the paying banker the chance to refuse them at the time he receives them. However, so long as there is likely to be any doubt at all as to rights and liabilities in this matter, I suggest that the forms used to give effect to this kind of transaction should be revised, so as to retain the general responsibility of the prime beneficiary for anything which may result ; in other words, the latter ought to underwrite the transferee, though, often enough, it is the prime beneficiary and not the transferee who is the weaker. While the buyer must be responsible for any loss that may result directly from compliance with his instructions or authority to transfer, which does not emerge from the paying banker's negligence ;

while also the prime beneficiary, by transferring, probably does not rid himself of any responsibility which may rest upon him as the result of his acceptance of the credit, it would be as well to remove any doubt there may be. I said last year that I saw no special value in the particular indemnity which bankers take today from the prime beneficiary when asked to transfer. It might be better if the indemnity were broader in its cover and made no mention of specific risks, for by this others may be excluded ; the banks may as well obtain the broadest possible cover against any loss which may result from the transfer, except that which is the consequence of their own negligence. Therefore, the prime beneficiary should guarantee to the paying banker that if the transferee does not enable the banker to comply with the opening banker's instructions, the prime beneficiary will, and if he fails will be responsible accordingly ; and should indemnify him against any loss he may sustain as the result of his accepting instructions to transfer. This seems to me to be more valuable than an indemnity in respect of the description, etc. of the goods and the genuineness, etc. of the documents—for which the banker would probably not be responsible anyhow. If, as I think, a banker cannot be forced to transfer to anyone at the instance of the prime beneficiary, he does not disobey his mandate by refusing, and it might be as well to make known to buyers and bankers establishing irrevocable transferable credits, and to prime beneficiaries, that until the credit is confirmed, its *irrevocability* applies only to the beneficiary, unless the instruction is that transfer is to be at the option of the beneficiary. A revised letter of acknowledgment of the receipt of instructions, coupled with an undertaking such as I have suggested above, should be adequate protection against the risks arising from transfer ; and it may be important that transfer should not be discouraged in view of its growing popularity elsewhere.

Some banks word their advices to the effect that the credit they are confirming is in favour of the prime beneficiary 'or assigns.' If the transfer is an assignment—it is certainly not a legal assignment, but probably amounts to an equitable assignment—the prime beneficiary does not avoid his responsibilities by transferring, and there can be no harm in making this clear in the request to transfer. Nevertheless, it would seem that to advise a credit as in favour of the prime beneficiary 'or assigns' or 'transferees nominated by you,' or 'your order' should be avoided, for the meaning of the first is uncertain and the other two seem to suggest the paying banker's acceptance of any nominee of the prime beneficiary. It is sufficient to advise an irrevocable, transferable credit. It may be useful here to recall that one of the large commercial banks in London does not follow the transfer procedure I have indicated above. It does not communicate with the transferee, but merely acknowledges to the transferor

his request for transfer ; it may be, however, that by accepting the prime beneficiary's instructions, the bank places itself in privity with the transferee through the agency of the prime beneficiary and, if this is so, much of the point in refraining from communicating with the transferee seems to be lost.

Where the opening and paying banks are one and the same, there is the additional point to consider—whether the banker in his capacity of opening banker is looking to the goods as security. If he has advanced against them it is the more important that he should be able to rely on the transferee, especially if the prime beneficiary happens to be only an agent or a weak principal and if, perhaps, the goods are falling in value. Normally when the beneficiary instructs the paying banker to transfer the credit, the original advice is withdrawn—altogether, if the credit is transferred *in toto* ; for endorsement if it is transferred only as to part. Thus it may be that the original beneficiary may be left with nothing to show how and to what extent he comes into the picture, though its absence need not affect his rights. What I wish to point out here, however, is that the beneficiary, having transferred his rights to a transferee, is left with the simple right—inherent in all transactions of transfer and which is also a duty—to substitute his invoices for those of the transferee. He is not entitled, for example, to take up the documents himself, for that would mean that the paying banker would be prevented from implementing his undertaking to the opening banker. Where the beneficiary asks to be permitted to take up the documents, this should not be agreed to except with the consent of the buyer.

Amendment

The beneficiary of a transferred credit may tender irregular documents. While the paying banker has, of course, the right to refuse, he may seek authority to accept them. This must be the authority of the buyer rather than the prime beneficiary, though the latter should in any case be advised and may have to consent. The paying banker's duty is to comply with his instructions ; these are those of the opening banker and cannot be varied by anyone. Hence it is the opening banker (or the buyer through him) from whom authority to vary must be sought. Nevertheless, the prime beneficiary cannot be ignored. His agreement with the paying banker would be prejudiced if the latter were to accept an amendment after he had committed himself to the transferee. Once the latter has been notified, the question whether any amendments required by the buyer can be put into effect depends upon whether the ultimate supplier transferee has already committed himself. If, for example, he has not changed his position as the result of the credit, he has no cause for complaint if the credit is amended. This is a question of fact. Nevertheless, it is a matter on which the advising

banker is not likely to have such information as will enable him to question the transferee's refusal to accept amendment.

The rights of the prime beneficiary in the case of amendment of an irrevocable transferable credit may depend upon the nature of the amendment. As I have indicated, the credit has been acted upon by the beneficiary to the extent that it has been transferred, and transferred because of a contract entered into between the beneficiary and the transferee ; it would thus be inequitable if any change in the relationship between the two could be made by the unilateral action of the buyer, even if the transferee himself accepted the change. The prime beneficiary could not be held to his responsibility under the credit if the credit as advised were amended without his consent. The consideration for the transfer is probably the prime beneficiary's indemnification of the opening bank ; the contract is binding and cannot be disturbed without the approval of both parties.

Whether the prime beneficiary is entitled to cancel his instructions to transfer depends upon whether the paying banker has committed himself to the transferee. If the banker has advised the transferee in the usual way, he cannot withdraw his consent and any cancellation by the transferor, or alternative instructions, would be ineffective. Even if the transferee had not committed himself, even if he had done nothing in reliance on the transferred credit, the prime beneficiary could not prejudice the paying banker by requiring him to act otherwise than in accordance with his offer or promise, unless the transferee and the buyer assented ; though where the transferee had been advised of the withdrawal of the facility and took no action after a reasonable time, the paying banker would be free to act on new instructions.

Uniform Customs

It may be useful here to mention that Article 49 of the Uniform Customs, which deals with transfer, was last year revised. It now reads :

> "A transferable or assignable credit is a credit in which the paying or negotiating Bank is entitled to pay in whole or in part to a third party or parties on instructions given by the first beneficiary.
>
> "A credit can be transferred only on the express authority of the opening Bank and provided that it is expressly designated as "transferable." In such case the credit can be transferred once only, that is to say that the third party or parties designated by the first beneficiary are not entitled to retransfer it, and on the terms and conditions specified in the original credit, with the exception of the amount of the credit, of any unit price stated therein, and of the time of validity or of shipping, any or all of which may be reduced or curtailed. In the event of

any reduction in amount or unit price, a transferer may be permitted to substitute his own invoices for those of the transferee for amounts or unit prices greater than those set forth in the transferee's invoices, but not in excess of the original sum stipulated in the credit, and upon such substitution of invoices, the transferer may draw under the credit for the difference between his invoices and the transferee's invoices.

"Fractions of a transferable or assignable credit (not exceeding in the aggregate the amount of the entire credit) may be transferred separately provided partial shipments are not excluded, and the aggregate of such transfers will be considered as constituting only one transfer of the entire credit.

"Authority to transfer a credit includes authority to transfer it to a beneficiary in another place whether in the same country or not, unless otherwise specified. During the validity of the credit as transferred, payment or negotiation may be made at the place to which the credit has been transferred.

"Bank charges entailed by transfers are payable by the first beneficiary unless otherwise specified.

"No transfer shall be binding upon the Bank which is to act thereunder except to the extent and in the manner expressly consented to by such Bank, and until such Bank's charges for transfer are paid."

This Article now runs nearer to British banking practice and to what I have suggested may be English law on this subject. It has the advantage over its predecessor that it now defines a 'transferable' credit, though the definition is not as clear as it might be, for what, for instance, is a credit in which the paying or negotiating bank is *entitled* to pay a third party ? It would have put the matter beyond question if the defining paragraph had read : 'A transferable (or assignable) credit is one which authorises a paying or negotiating bank at its discretion to pay in whole or in part to a third party nominated by the first beneficiary.' Incidentally, in the official version of the Uniform Customs, the word is *autorisée*. Moreover, as it reads at present, it is not clear whether the wording 'in whole or in part' is intended simply to cover the payment of the prime beneficiary's profit or whether the credit can actually be transferred as to part, the prime beneficiary utilising the remainder. If, as the Uniform Customs state, "a credit can be transferred only on the express authority of the opening bank"—as I believe—and "provided that it is expressly designated as 'transferable,' " is it to be assumed that a credit marked 'transferable' without more, carries the authority of the opening bank and that the paying bank is 'entitled' to pay a third party ? It might have been useful to include that a credit is deemed to be transferable if it is so described, whether or not it expressly says so in the body of it.

The third paragraph of the Article indicates that where part shipments are not excluded—not simply where they are allowed—a transferable credit may be broken up for transfer, to several transferees 'horizontally'; this is contrary to British practice. The purpose of paragraph four is not clear. It says that "During the validity of the credit as transferred, payment or negotiation may be made at the place to which the credit has been transferred." It is difficult to see how, in general, payment can be made elsewhere than at the place of the paying banker; payment at any other place must be negotiation even if at a branch of the paying bank.

The Article might have added that by transfer a beneficiary does not rid himself of his responsibilities under the credit, that he is still liable and must indemnify the bank in respect of any loss it may suffer through permitting transfer; but, as I have shown, this may be done in the document by which the prime beneficiary requests transfer. And if it is thought wise to be thorough it might have been useful to provide that the opening banker also shall be responsible for anything done by the paying banker as a consequence of the credit, providing he is not negligent. This to my mind is the position in English law.

Interpretation of Credits

Much of the difficulty in regard to credits arises from the lack of precision which characterises the terms in which so many of them are couched or from the lack of uniform understanding of instructions received. Often the openers of credits fail to say precisely what they want, with the natural consequence that paying bankers are led into acting in ways which are not intended, or that costs are incurred unnecessarily, or that the buyers are given the chance to avoid their contracts, thereby prejudicing the beneficiary. I propose tonight to deal with the underlying principles where discrepancies and misunderstandings occur, though clearly, in the time I have, I can only give a few examples illustrative of the points I wish to make.

An amusing example of a misunderstanding arising from misinterpretation of a cable is given in the *Revue de la Banque* for 1951, no. 9–10. There, M. Fernand Lison refers to a case—which did not come into the courts—in which a bank received telegraphic instructions to open an irrevocable credit. After the mention of the goods came the word 'Ultramon,' which the bank assumed was the trade mark of the manufacturer. They accordingly passed on the name in their advice and when the documents were presented without mention of it, they wrote to the beneficiary to the effect that only if the invoice included it

could they pay. The beneficiary complied, tendering another invoice, and the bank paid, only to discover when the confirmation of the cable arrived that the name was a code word, mutilated, having nothing whatever to do with the description of the goods.

Documents

The importance of strict compliance with the terms of credit, of not assuming that a similar description will do, is well illustrated by the recent decision in *Bank Melli Iran* v. *Barclays Bank (D. C. & O.)* (*Journal of the Institute of Bankers* (1952) vol. LXXIII, p. 53). The facts were that in 1946 Mohammed Reza Kharrazi and Co. of Iran bought Chevrolet trucks, which were being disposed of by the representative in Belgium of the Foreign Liquidation Commission of the United States of America, from London Suburban Commercial Vehicles (Brixton) Ltd., payment to be made by means of an irrevocable credit to be opened by Bank Melli Iran and confirmed by Barclays Bank (Dominion, Colonial and Overseas). The credit was opened by cable, which was duly confirmed and, for reasons with which it is not necessary for me to deal, was amended by cable reading :

> "We amend credit 15249 as follows stop amount increased to sterling 45000—of which sterling 40,000 represents value 100 new Chevrolet trucks payable against delivery order issued in your name invoices insurance policy and U.S.A. Government undertaking confirming said trucks are new stop goods must be shipped under your supervision at beneficiaries' expense and when bills of lading our order and insurance policies our name are delivered you are authorised to pay sterling 5000—notify accordingly."

To this Barclays asked whether part shipments were allowed and for the port of shipment to be named, and stated that it was not their custom to have delivery orders issued in their name or for them to supervise shipment, which points were duly cleared up, and upon which they issued their confirmation of the credit in the following terms :

> "Our irrevocable confirmed credit No. 47/111. We are today requested by Banque Melli Iran Head Office Teheran to open an irrevocable credit in your favour for account of Mohammed Reza Kharrazi & Co. to the extent of £45,000 against presentation of the following documents :—Full set of clean 'on board' Bills of Lading endorsed to order of Banque Melli Iran . . . invoices . . . insurance policies or certificates in the name of Banque Melli Iran Teheran for 110 per cent. invoice value against WPA fire theft shortage water damage up to 30 days after arrival of goods at Teheran sinking war risks whilst afloat covering shipment of 100 new Chevrolet trucks in one or several shipments to Koharramshahr c.i.f. P.S.—We

are authorised to effect payment of £40,000 representing the value of—100 new Chevrolet trucks, against Delivery Order issued by London and Suburban Commercial Vehicles (Brixton) Ltd., in the name of Messrs. Tallack Stott & Co., or Messrs. Tallack Stott's receipt for the goods, accompanied by invoice, insurance policy and U.S.A. Government undertaking confirming that the trucks are new. Pending shipment the goods are to be insured against fire and loss during transport up to delivery on board the ship. The balance of £5,000 is payable against delivery to us of the documents originally stipulated in this advice. The risks against 'loss during transport' must also include theft, pilferage, breakage, riots, strikes and civil commotions. In the event of delivery order being presented we shall return this document to Messrs. Tallack Stott & Co. against their undertaking to effect shipment in accordance with the credit. If a receipt for the goods issued by Tallack Stott & Co. is presented this must be accompanied by an undertaking as above."

There was no question that this was in accordance with the instructions of Bank Melli and thus the shipment was to be met as to £40,000 against delivery order, insurance policies covering the goods up to shipment, U.S.A. Government undertaking confirming that the trucks were new ; and as to £5,000 against on board bills of lading and insurance policies or certificates as before. In the meantime the trucks were in the open in Belgium in severe weather. Of the documents tendered the invoice was in the following terms :

"To 100 'one ton' Chevrolet trucks *in new condition* ex site at Balcele near Antwerp Belgium £40,000."

The document accepted as complying with the requirement of a "U.S.A. Government undertaking confirming that the trucks" (or "the said trucks") "are new" was headed : "United States of America, Office of the Foreign Liquidation Commissioner, Field Representative for United Kingdom" and read :

"Gentlemen, This is to certify that the London Suburban Commercial Vehicles (Brixton) Ltd. have purchased 100 new, good, Chevrolet M6 4 × 4 trucks from the United States of America at Barcelle, near Antwerp, Belgium. Very truly yours, for the Field Representative : Thatcher Harward, Capt. A.C. General Sales Branch."

The learned Judge decided that neither document was that called for by the credit. He held that 'in new condition' was not the same as 'new' and further that not only could 'new,' good' not be regarded as 'new,' but that the American Government certificate did not relate to specific trucks—in other words, it might have related to any ; and he refused to listen to the argument that there was no practical way of identifying the

trucks in the delivery order and certificate. He accordingly held that the bank had not complied with its mandate. It may be thought that with the pressure of work on documentary credit departments at the time and today, such rigid construction of documents called for by a credit is unreasonable. Nevertheless, it is all to the good that the importance attached by the law to this duty should be so emphasised.

That the position is similar elsewhere is shown by another interesting foreign illustration to be found in a decision of the Tribunal de Commerce de Liège of March 3, 1951, referred to in the *Revue de la Banque*, 1951, no. 9/10. An irrevocable credit called for bills of lading in the name of a Brazilian consignee. They were in fact drawn to order and endorsed in blank and the bank paid. It was held that they were wrong in doing so, and such would be the case in this country also. Actually certain Brazilian customs duties would have been avoided if the bills of lading had been drawn as indicated. In this same connection the *Revue Trimestrielle de Droit Commercial* (Paris, 1951, p. 331) cites a case in which the Court of Appeal of Aix-en-Provence held the bank to be wrong in paying against documents which did not bear the mention 'goods on board' signed and dated, the credit having called for this. The same court, by a decision given on February 8, 1951, held that a buyer was justified in refusing documents covering a shipment of rubber c.i.f. Marseille, the bill of lading being claused 'le Havre-Transit' while the invoice and other documents showed 'shipment c.i.f. Marseille.'

Freight Paid

I should like now to refer again to the American case which I have already mentioned in another connection—*Dixon, Irmaos & Cia. Ltda.* v. *Chase National Bank of the City of New York*—for it settles, at least in American (or perhaps, I should say, New York) law, a point which is fundamental. A Brazilian exporter sold cotton c.i.f. to a Belgian buyer, payment to be by irrevocable credit. The plaintiff presented documents through the Guaranty Trust Co. of New York to the Chase National Bank, but the latter declined them on the grounds (*a*) that they did not include a full set of bills of lading ; and (*b*) that freight was not prepaid. The first point has been dealt with by me earlier, the Guaranty Trust Co. having offered its indemnity which was refused, and the Chase National Bank having lost the point by reason of the fact that it was held customary to accept such indemnities, a fact which, according to the court, had to be read into the contract between the paying banker and the seller.

The defendant bank also lost the second point. The plaintiff had shipped the goods 'frieght collect,' and had deducted the freight from the invoice. The lower court found that :

"15. The ordinary and accepted meaning of a c.i.f. contract

is that the contract price includes the cost of the goods, the cost of insurance and the cost of freight to the point of destination. The term does not imply the time when or the place where the freight is to be paid and there was no uniform practice in New York on May 15, 1940, or prior thereto of prepaying freight to the point of destination under a c.i.f. shipment. The practice was that it was sometimes prepaid and sometimes deducted from the invoice.

"16. The 'American Foreign Trade Definitions' are incorporated by reference in the letters of credit and such definitions, including the definition of a c.i.f. contract, is a part of the credit. Under the definition of a c.i.f. contract as defined in 'American Foreign Trade Definitions' there is no requirement that a shipper must prepay freight.

"18. The tender of documents showing a deduction of freight from the invoices was not a deviation from the requirement of defendant's credits calling for c.i.f. shipment."

With these findings the Appeal Court agreed, in the following terms :

"In the case of a sight draft, it is wholly immaterial to the buyer whether freight is prepaid or credit given on the invoice price. In the case of a time draft, it is true that the buyer may be deprived of the credit period as to part of the purchase price, that is, so much of it as the freight amounts to. In the case at bar the freight was $1,359.14. The measure of any possible loss to the buyer is the interest upon this sum for the period between arrival of the goods and the date the drafts would fall due and the possible inconvenience of being called upon for early payment in cash of this portion of the price. The bills of lading were endorsed 'on board' on May 5th and, if we assume the voyage would take 30 days, the buyer would not be called upon for the freight until June 5th. The draft if accepted on May 15th would have been due 90 days later, that is, the buyer would have had to pay freight about 70 days earlier than he would otherwise have paid such sum. Interest at 6 per cent. would amount to about $17. On a transaction involving about $9,700 such a sum is insignificant. The law has not cut so fine. The point of possible inconvenience is taken care of by ancient usage. The seller has so long had the option of shipping either freight collect or freight prepaid that the cases recognize the option as part of the standard meaning of the term c.i.f., making no distinction between prepayment or shipping freight collect and crediting it on the invoice irrespective of whether the draft be time or sight. See *Ireland* v. *Livingston*, L.R.5, H.L. 395, 406 ; *Thames & Mersey Ins. Co.* v. *United States*, 237 U.S. 19, 26, 35, S. Ct. 496, 59 L. Ed. 821, Ann. Cas. 1915 D, 1087 ; *Warner Bros. & Co.* v.

Israel, 2 Cir., 101 F. 2d 59, 60. As the court pointed out in finding 16 the American Foreign Trade definitions provide that under a c.i.f. contract the seller must pay the freight, but make no mention of prepayment. Furthermore, if the buyer sells the documents before arrival of the goods, as frequently happens in c.i.f. transactions, whether freight was prepaid will be wholly immaterial to him.''

I think that few English banks, if any, would have paid against documents covering a shipment on c.i.f. terms which did not show that freight had been prepaid and it is difficult to see how they could unless expressly authorised. In spite of Blackburn, J.'s statement in *Ireland* v. *Livingston* ((1872), L.R. 5 H.L. 395, at p. 406), which case the American court cited, in which he speaks of the buyer being given ''credit for the amount of the freight he will have to pay to the shipowner on delivery,'' it seems to me that from the point of view of payment under a documentary credit covering a c.i.f. shipment freight must be prepaid, because in the absence of any indication in the credit the paying banker cannot know what is acceptable to the buyer, if under the sales contract the seller has the option.

The essence of a c.i.f. contract is that the shipper shall procure a contract of affreightment ; it is not essential that he should pay the freight in advance, though this is done in the majority of cases. But the credit contract is different ; the fact that the shipment is c.i.f. is incidental and unless opening instructions authorise the paying banker to accept the bill of lading not marked 'freight paid,' the banker cannot do so. He would not be safe in assuming that, in making no mention of freight in the credit, the opening banker was leaving the point to his choice.

The New York Court of Appeal would seem to have been at pains to show that the possible loss of interest to the buyer in respect of that part of the price which represented freight was negligible—or at any rate insignificant in relation to the value of the shipment ; but what if the shipment had been a much more valuable one—one on which the freight would be calculated at a much higher rate ? It is not easy to understand this argument.

A similar decision would not necessarily be reached in this country and thus there is the possibility of a conflict, where a shipper ships 'freight collect' under a credit covering a c.i.f. shipment, the documents are accepted and paid for by the American bank on the strength of New York law, but are declined by the English bank because of English law.

Part Shipments

It is, at times, difficult to know whether shipments are in accord with a credit under which part shipments are (or are not) allowed ; and what the expression 'part shipments allowed'

means in relation to other shipping requirements of the credit. To begin with, if the credit does not authorise part shipment, but calls for documents covering, say, 20 bales of cotton from Alexandria to Antwerp, is it a good tender to offer two bills of lading each for 10 bales shipped on the same ship ? I should be prepared to argue that this is within the terms of the credit. It is not essential that the goods should have reached the ship at the same moment and it is probably enough if the credit does not stipulate shipment in one lot—though not possibly, if there were separate invoices and policies for the two bills. But if ten bales were loaded at Port Said and ten at Alexandria on the same ship, I should say that these were each partial shipments, because clearly they went on to the ship at different times and places ; and thus the terms of the credit have not been complied with and the fact that there was only one invoice and one policy would, I think, not alter the position. Again, where a credit calls for a shipment of twenty bales to a port in the Union of South Africa, to ship in the same ship under two bills of lading each for ten bales, one lot for discharge at Cape Town and the other for discharge at Durban, would not, in my view, be satisfactory.

It is not easy to be dogmatic in these matters, for there is no universal definition of 'part shipments' (the Uniform Customs do not help on this point) and therefore, these are largely matters of opinion.

When the authority to ship in parts is accompanied by other stipulations as to shipment, the interpretation may be even more difficult. A credit is established through London in favour of a continental seller calling for 'shipment in equal monthly lots in July, August and September—part shipments allowed.' The first part shipment in July is declined as the documents are not in order and the matter is not rectified in time to permit one-third of the total shipment to be effected in July. The question which arises is whether the failure to comply is such as goes to the root of the contract, entitling the banker to refuse any further documents tendered, in August and for September. In my view, the paying banker's responsibility under the credit is at an end, on the ground that the credit contract is not divisible. It is anyone's guess what the buyer meant and it would be wise for bankers to refuse such instructions without clarification. If the beneficiary contracted from a country which subscribed to the Uniform Customs, it is still doubtful what the position would have been and, anyhow, he could not assume that the Customs governed the buyer unless he also was in a subscribing country. Article 37 suggests not unnaturally that partial shipment means shipment by instalments and asserts that if an instalment fails, it cannot be added to subsequent shipments ; but that that there is nothing in this to invalidate further shipments within prescribed periods. The

governing factor in the example I have just given you is that the monthly instalments were to be equal.

Quantities

Credit descriptions of quantities are not always clear and even if they are, it is not always possible to determine the responsibility of the paying banker in this respect. Where a credit is opened for a total amount of 'about' £5,000 in respect of 'about' 500 tons of a particular commodity and nothing is said as to price, part shipments being allowed, the obligation on the bank accepting these instructions is by no means certain. It could be argued that so long as the bank paid no more than ten per cent. (or whatever tolerance was customary) over £5,000 against documents covering no more than ten per cent. over 500 tons, it had complied with the credit. But could the buyer insist that it was the duty of the bank to see that the price did not vary ? In a case I heard of, later shipments were at a higher price, though this did not affect the credit as a whole. Instructions such as these should, of course, be declined, for they leave too much to the imagination ; but the credit was a negotiation credit and the negotiating bank did not see the credit until the documents were presented to them for negotiation. They could have refused, but that meant turning business away. I think that the bank is not called upon to consider the price unless price is mentioned in the instructions and, anyhow, if there were any wide variation either the amount of the credit or the quantity of the goods would fall outside the tolerance. On the other hand, if a credit states that part shipments are allowed against proportional payments, the bank would be wrong in paying unless the invoice showed a value in proportion to the size of the shipment.

Where quantities are specified in a credit, the form in which they are specified must be adhered to. For example, a bill of lading covering 20 bags of coffee weighing in total 1,000 kilos, is not acceptable under a credit calling for 20 bags weighing 50 kilos each. Again, where a credit calls for 100 boxes weighing in all 500 lbs. ; and the invoice merely shows 100 boxes and the bills of lading merely 500 lbs., the documents are irregular. Difficulties sometimes arise through different national systems of measurement. In this connection, instructions for a credit calling for 1,000 tons should not be accepted without clarification ; documents covering 1,000,000 kilos (1,000 metric tons) would not be acceptable.

I dealt last year with the case where the credit called for shipment amounting to £500 and documents are tendered for goods to the value of £600, with a request that £500 be paid and the excess collected. I think that the payment would not be in compliance with the terms of the credit, and that the buyer would be within his rights in refusing the documents. Where, too, a credit

calls for bills of lading covering, say, 500 tons of a particular commodity, and when the bills of lading are presented they show additional goods or, say, 100 tons more of the commodity, said to have been ordered by the buyers, these bills cannot be accepted even if the other documents are in order and no payment is asked for the excess.

Deck Shipments

Where a credit calls for shipment under deck, a bill of lading should not be accepted unless it states categorically that the goods are shipped under deck, even if the goods are such as would normally be carried in that way and the bills do not show anything to the contrary. A bill of lading marked "on deck at shipper's risk" should not be accepted unless authorised by the buyer, for the bill is not clean. It seems to me that the position is no different even if it is customary for the particular goods to be stowed on deck, as a banker cannot, and is not expected to, know.

Opening or Confirmation

One would have thought it hardly necessary to stress the importance of complying rigidly with instructions, but it appears that, for reasons of convenience, there may sometimes be a deliberate alteration. For instance, bank A asks bank B to open an irrevocable credit in favour of an exporter in B's country and provides full cash cover. Bank B advises the beneficiary that bank A has opened its irrevocable credit, to which bank B adds its confirmation. It may be thought that this comes to the same thing, but in the event of the bank B's not being in a position to honour its confirmation, the beneficiary would have a document on which under foreign law he might proceed again the bank A, with the result that the latter would have to honour its irrevocable credit and might not be in a position to recover the sterling deposit made to the confirming bank. The solution is that bank A should refuse to put up cover unless the bank B complies rigidly with the instructions given to it.

Validity

The importance of clarity as to when and where a credit expires needs no emphasis. If a credit expires at the London office of a confirming bank on a certain day, the tender of documents on that day to a branch office of the confirming bank is not compliance with the terms of the credit. Validity is generally a question of the phrasing of the credit as given to the confirming or advising banker, but sometimes these instructions are worded without clear definition, giving only an expiry date and merely asking the paying banker to confirm or not as the case may be. The expiry instructions may take the form either that the credit expires on a given date or that shipments must be made by a given date. In

the latter case the position is clear, but not in the former, and thus the paying banker should ask for instructions but, if he has not time to do this before advising or confirming the credit, should assume that the credit expires in the place of its origin. On the other hand, if the credit indicates a date by which documents and drafts must be negotiated or drafts accepted, then in these cases the credit probably expires in the place in which the negotiation or acceptance is to be effected. If the credit instructs the paying banker to pay and quotes an expiry date, it is a question of construction whether the credit is available, up to the date mentioned, in the place where payment is to be effected, for even though it is the paying banker who pays, yet the place of payment intended may be the place where the final payment is effected as the result of the opening banker's being satisfied that the documents are in order. In the case of payment it is not safe to generalise.

Again, the position may depend on how payment is to be effected. For instance, if payment is to be effected by bills drawn on London, then the credit is presumably available in London. This is a question of intention to be gauged from the terms of the credit and the circumstances.

Whatever may be the objection to making the credit expire in the centre of the paying banker—which is probably unusual—this has the advantage that it leaves the paying banker in no doubt ; whereas there is always the doubt, if the credit expires in the country of the opening banker, whether the paying banker can tender the documents in time. This places on the paying banker the responsibility for delay or loss of documents in the post.

Refusal of Documents

Does objection to certain irregularities in documents bar later objections to other irregularities ; what is the position if after an objection to documents is raised and resolved by rectification within the validity of the credit, further objections are now raised which the beneficiary cannot rectify before the credit expires ? Even though a bank may thus indirectly prevent a beneficiary from complying with the credit in time, it cannot, in the absence of any express or implied undertaking to the contrary, be required to accept the documents after rectification of the irregularity, because the seller has only himself to blame and if in doubt should have enquired at the time the documents were first returned for rectification. At no time was his tender valid and at no time was he entitled to assume that it was. But it would be unwise to assume that this would always be the case, for there could be circumstances in which that reasoning might not apply.

Loss of Documents

With the mass of documents passing from one country to

another, it is, perhaps, surprising that losses are not more frequent. Where documents are lost, the question arises: whose is the responsibility, an important question if there is likely to be a loss and one which may be less easy to answer when it arises between two countries and not within one only. It may arise in circumstances such as the following, where negotiation credits are opened by this country in favour of foreign sellers, the foreign negotiating banks being credited only under reserve or paid when advice is received that the English buyer has paid, which means after the documents arrive in this country. The foreign bank is left in the air in the sense that it has to bear the responsibility for delay in the despatch of the documents or for their loss—matters beyond its control. Presumably the bank is the agent of the opening bank and its rights are dependent on the wording of the contract. This undertakes to reimburse any banker negotiating the proper documents within the validity of the credit and on the strength of it, and unless it goes on to qualify this undertaking to pay by making it conditional upon the documents' arriving safely in the hands of the opening banker, it is the latter who takes the risks attendant upon delay and of loss in the post; and the foreign bank is entitled to recover as soon as it had done what it has agreed to do. As a matter of reason it must satisfy the opening banker of this, which it does normally by sending him the documents, but there is in law no occasion for any longer delay before payment to the foreign bank is made. It is likely, of course, that if the opening banker insisted on receiving the documents before he reimbursed his foreign correspondent the latter would be reluctant to negotiate. On the other hand, until the opening banker receives the documents he cannot know whether they are in order.

In this country the carrier is regarded as the agent of the contracting party who stipulated the method and carrier to be used, and delivery to the carrier may mean either (*a*) retention by the seller of dominion over the documents or (*b*) if the buyer has stipulated for the method, delivery to him. To trace the responsibility for loss of documents, therefore, one must look at the several contracts embodied in a complete documentary credit contract. Delivery to the paying banker is delivery to him as agent or mandatory of the opening banker. Ordinarily, in these days of air-mail, there is no mention by the opening banker of the method by which documents should be sent and, where there is, it is the opening banker, on the instructions of the buyer ,who does so. If the loss of documents occurs in despatch from paying to opening banker any loss which may result will depend in general on the rules I have stated above, in the absence of any factor which changes the position, but in general once the paying banker has despatched the documents, his responsibility is ended. Where, however, the position is reversed, as in the case of an

export credit, the position would probably depend upon the law of the country in which the credit originates. But the Uniform Customs have something to say on the matter. Article 12 states that "Banks assume no liability or responsibility for the consequences arising out of delay and for loss in transit of any messages, letters and/or documents . . . ," which means that the ultimate responsibility is with the buyer and seller and that where a paying bank has done what it has been authorised to do, it can claim reimbursement from the opening banker.

So much is clear ; but what if the documents are lost in transit between the beneficiary and the paying banker or between the opening banker and the buyer ? Here again, local law determines the position in both cases and there is no conflict of laws, except that the determination of the responsibility for the loss as between seller and paying banker may be a matter of serious moment for the opening banker and the buyer, in the sense that the opening banker's contract with the paying banker may depend on that between the paying banker and the seller. Where, for instance, it is reasonable for a seller to send his documents by post to the paying banker and they are lost, he is entitled to his money if he can show that the documents are what were called for, if, in other words, the post may be regarded as the agent of the banker. And the paying banker is probably able to claim against the opening banker even if he is unable to produce the documents. This may not be serious in itself, but it would be where the documents were originally despatched within the validity of the credit and yet the paying banker cannot show that he received them within that time.

To summarise, it is probable that in the vast majority of cases the post is the agent of the opening banker in relation to the paying banker and of the latter in relation to the seller. Thus if the seller, on the one hand and the paying banker on the other comply with the terms of the credit, they are entitled to claim and the fact that the documents cannot be produced (providing satisfactory evidence is forthcoming) is no permanent barrier. The same applies to delay in the post.

Conflict of Laws

In foreign trade the question of the law to be applied could often arise and might not be easy to decide. Insofar as bills of exchange are concerned, the problems are governed by the rules of conflict of laws applicable to negotiable instruments, to be found, as regards this country, in the Bills of Exchange Act, 1882. As regards the contracts embodied in a documentary credit, the position will depend upon the particular aspect of the contract in question, the parties and the circumstances. For instance, any action by a beneficiary in England against a banker in this country will obviously be settled according to the law of England ; similarly, any action between the buyer abroad and his (the

opening) banker will be judged according to the law of their country. As between parties in different countries the question can, of course, be settled by agreement between the parties, but this is rarely done, in which case it becomes a matter of intention to be gathered by implication, if such there is ; but if there is nothing to guide, then it maybe that the law of the place will apply in which is done or is to be done the act that gives rise to the action. For example, where a seller abroad tenders documents in London to the banker who has confirmed or issued an irrevocable credit and payment is refused, any action which may be brought on the refusal would probably be brought in the English courts and judged according to English law. There would be no point in the seller bringing it in the seller's country, unless the bank had assets there. The contract between the two arises by the offer and promise of the English banker addressed to the foreign seller, completed by the acceptance of the latter. But where a foreign banker is interposed between the English opening banker and the seller, other considerations may apply. There is authority for the view that the matter depends upon the nature of the contract or of the particular aspect of the transaction and of the surrounding circumstances, and on whether the contract is more closely associated with one system of law than another (see *Jacobs* v. *Crédit Lyonnais*, ((1884), 12 Q.B.D. 589) ; *Jones* v. *Oceanic Steam Navigation Co.*, ([1924] 2 K.B. 730) ; and Westlake's *Private International Law*, 212).

It would be straining reasoning too far, in the case we are considering, in the absence of any express stipulation, to suggest that it was in the contemplation of either party that any action on the contract should be brought in the seller's country or judged by the law of that country. Gutteridge* does not accept the view that "what the parties intended to be the proper law of the contract" is applicable, but rather "what law would be selected by reasonable men of business in all the circumstances of any particular transaction." If business men would choose that system of law which would most likely bring the desired result, we are not taken very much further, for business men in two different countries would not often be likely to choose the system of law applicable to the country of either. Where, however, the choice of both was a third system of law, Gutteridge's selective system and the proper law of the contract as intended by the parties might well be the same. With diffidence, however, I incline to the opinion that no Court would apply a national law which was opposed to that which the parties, even by implication, chose. But it is not possible to generalise with safety.

Vincentelli v. *Rowlett* ((1911), 16 Com. Cas. 310) was a case in which the adequacy of a policy under a credit calling for all risks cover was in dispute. The ship was British and the shipping company was undoubtedly liable in English law, but not in

Bankers Commercial Credits, p. 102.

Belgian law. The Belgian plaintiffs sued the sellers in Antwerp and lost. They then tried their luck in London and it was held incidentally that they were negligent in not having discovered that they had a good case according to English law and in not proceeding accordingly.

There are many other circumstances in which the question of foreign or English law may arise. Where credit instructions given to an English bank stipulate a marine insurance policy, it is assumed that the policy of an English company will be required if the credit is in sterling. But if the seller is on the continent of Europe, for example, would the policy of a company in the seller's country be acceptable ? Whether a policy not enforceable in the English courts or not in form valid according to the law of England would be acceptable under an English credit calling for an 'approved' policy, was a question which Bankes, L.J. declined to answer in *Scott* v. *Barclays Bank* ([1923] 2 K.B. 1). In the same case, at p. 16, Scrutton, L.J. thought the question of great importance whether under a letter of credit expressed in sterling the policy must be payable in sterling to be acceptable.

An interesting decision has just been given in the Court of Appeal in *Macleod Ross and Co., Ltd.* v. *Compagnie d'Assurance l'Helvetia of St. Gall* (*The Times*, 22 January, 1952). The plaintiffs were buyers of tinned meat from the Continent, which was insured by the defendants under an open policy of the sellers, against which the defendants issued two certificates of insurance in French. The open cover had a number of conditions, one of which was that claims under it should be settled by the Tribunal of Commerce at the place where the contract was signed. This condition was not incorporated in express words in either of the certificates, though both contained some reference to the open cover. The Court of Appeal held that the condition could not be regarded as incorporated in the certificates so as to preclude the plaintiffs from suing in the English courts. The fact that the certificates themselves contained a number of conditions but not the one in question rendered the latter excluded by implication.

Sometimes—as I have indicated above—the opening banker stipulates that the credit is to be construed and dealt with according to the Uniform Customs. If the paying or negotiating banker does not object to this stipulation he will be bound by it whether the Customs are accepted in his country or not ; and he must, of course, include the stipulation in his own advice or confirmation to the seller. The point is that the paying or negotiating banker, if he accepts, must take the instructions as he finds them unless he obtains an amendment. Such a condition becomes part of the contract which binds the paying or negotiating banker and the seller, unless the former keeps it out of his advice—for the consequences of which he would be responsible. In the case of *Vita Food Products Inc.* v. *Unus Shipping Co.* ([1939] A.C. 277), the

plaintiffs were American, operating in the United States, the defendants were Canadian and the cargo belonged to a Newfoundland seller. The facts are not important in the present connection, except that the bill of lading stipulated that the shipping contract should be governed by English law. And so it was held that English law was the proper law of the contract.

In *Pavia* v. *Thurmann-Nielsen* ((1951), 2 T.L.R. 802) although both sellers and buyers were foreign, the sellers' contract incorporated the general conditions of the Incorporated Oil Seed Association of London. In other words, insofar as the scope of their conditions went, the contract was to be interpreted according to an agreed English code. This could have some bearing in the event of a dispute on the credit.

If an American bank in its instructions uses an expression which has a special meaning according to the law of England it may be that English law would apply—as in the case I have already dealt with in which American law gives what may be a different interpretation of a credit covering a c.i.f. contract. English bankers cannot be expected to have a knowledge of American law or Americans a knowledge of English. In such a case it is impossible to say what the result would be ; much might depend upon other circumstances—there can be no hard or fast rule. Sometimes there are differences arising from differing practices, as where South African practice permits of a different quantity margin from English or American.

But documents are usually accompanied by drafts, generally sight drafts, but sometimes 'time' drafts. If the documents are declined, the drafts are dishonoured—which means that, strictly speaking, documents must be dealt with within the time during which a banker is entitled under the Bills of Exchange Act, 1882, to pay or dishonour bills of exchange. This simply was not possible in the days after the war, when the pressure of work was so great that it might have been a week before a decision could be reached. That I have not heard of any action being brought on a bill of exchange treated as dishonoured after the statutory period had elapsed, must be due to the fact that it was subsequently paid or that the irregularity in or inadequacy of the documents rendered any action on the bill futile. As I have said before, the two, the bill and the credit, may be so tied together that they stand or fall together. This brings out the question of conflict ; if the bill is drawn on a foreign buyer or his correspondent, the question of dishonour will fall to be decided according to the law of the buyer's country. Suppose the documents are deliverable to the buyer, against acceptance of a 'time' bill which is subsequently dishonoured—for any reason whatever ; the law of the buyer's country will govern the acceptance and the dishonour ; the law of the seller's country will govern the negotiation if the bill was negotiated in that country. It would thus seem

desirable that drafts should, as far as possible, be drawn on a banker in the seller's country or on London, though there is the advantage, in drawing on the buyer, that his acceptance is actionable, whereas the refusal of the documents may not be.

All this points to the value of establishing a minimum practice, not only in banking but in shipping and, to a less extent, in insurance, and among shippers—a code by which different nationals will know what each other means, or at least, will be safe in acting according to an agreed undertaking.

There is no panacea for all documentary credit ills. These problems have to be met and dealt with as they arise and it is safe to say that they will be solved, but it is as well that the risks should be known and, where they are universal and capable of diminution by universal or common agreement, should be thus reduced.

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